pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2015-SC-000271-DE

REBEKAH MCCARTY APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HON. BETH LEWIS MAZE
NO. 12-CI-123

COURT OF APPEALS NO. 2014-CA-000113

KENNETH FARIED APPELLEE

BRIEF OF APPELLEE
KENNETH FARIED

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by First Class U.S. Mail on this 1 day of December, 2015 to: Hon. Beth Lewis Maze, Bath Circuit Court, P.O. Box 1267, Mt. Sterling, KY 40353; Eileen M. O'Brien, Stoll Keenon Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507; and to Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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STATEMENT CONCERNING ORAL ARGUMENT

The Court of Appeals reversed the trial court on four issues. Appellant sought review of three of those four issues. Except for the Court of Appeals opinion in this case, there does not now exist in the Commonwealth clear precedent on any of these issues. As a decision from this Court on any one of these issues will significantly impact future child support rulings, oral argument should be granted.

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STATEMENT OF THE CASE

I. Summary of the rulings below.

This matter is before this Court on discretionary review of the Court of Appeals' Opinion vacating and remanding the Findings and Amended Findings of Fact, Conclusions of Law and Judgment of Child Support entered by the Bath Circuit Court on September 19, 2013 and October 31, 2013.

The trial court had ordered Appellee Kenneth Faried to pay child support of $4,250.00 per month for his four-year-old daughter Kyra who lived with her mother Appellant Rebekah McCarty, McCarty's boyfriend Kahlil Owens, their infant son Malachi Owens, and other members of Rebekah's family in her childhood home in Owingsville, Kentucky. In addition, Kenneth was ordered to provide health insurance for Kyra and to pay all of her medical and child care expenses.

Both parties and both courts below agreed that deviation from the Kentucky Child Support Guidelines was warranted in this case because Faried's income exceeded the guideline income limitations. The Court of Appeals vacated the child support order, however, because the trial court did not follow Kentucky precedent establishing evidence of the dependent child's reasonable needs as the touchstone for determining the appropriate amount of child support.

McCarty argued below and her primary argument here is that Kyra's reasonable needs are an unreliable indicator of the appropriate amount of child support because McCarty and Faried never lived together and therefore Kyra had never enjoyed a lifestyle commensurate with her father's income. The trial court agreed with McCarty's argument and, as the Court of Appeals found,

assessed Kyra's reasonable needs at a "figure seemingly born of whole cloth because it does not comport with McCarty's testimony, and some of the items identified by the court were not requested by McCarty. It appears the trial court has attempted to micromanage the rearing of Kyra by using its *own* estimate of costs and needs – supplanting the way McCarty and Faried would raise their daughter with the way the trial court would raise Kyra." Court of Appeals Opinion at page 23 (emphasis in original) (hereafter "Opinion at _____").

Departing from the child's established reasonable needs standard left a void that the trial court sought to fill with its own estimation of how Kyra should be raised. The Court of Appeals rejected this tail wagging the dog approach in determining the reasonable needs of a child from the bench's perspective of an appropriate lifestyle rather than the lifestyle actually chosen by the parents. It concluded that the "child support order must be rooted in reality and bear a reasonable relationship to the evidence – hopes, dreams, and plans simply are not evidence of actual expenses and reasonable needs." Opinion at page 22.

Before the case left the trial court level, that court vacated additional orders as concededly outside its discretion, including orders that Faried "set aside $500.00 per month for [Kyra's] future educational needs," and arrange for and fund nutritional, fitness and financial counseling for McCarty. Amended Findings of Fact and Conclusions of Law, Record on Appeal at 198-99 (hereafter "RA at ____").

The trial court made its new order of child support retroactive to its October 2012 temporary support order of $2,000.00 per month plus health insurance and child care costs, creating an arrearage of $24,100.00. RA at 167.

II. **McCarty's evidence of Kyra's needs.**

McCarty testified that she and Faried met in college when he played basketball for Morehead State University. They were friends who never lived together and never married. Kyra was born in March 2010 when Faried was still a student at Morehead. Faried was drafted by the Denver Nuggets in spring 2011, but due to the strike and lock out, he did not begin playing and earning income until early 2012.

At the time of trial, McCarty shared a room in her parents' home with Kyra, McCarty's boyfriend Kahlil Owens, and McCarty's and Owen's one-year-old child Malachi. Videotape of June 27, 2013 hearing at 9:17:24 and 10:26-10:27 (hereafter "VR at _____"). McCarty testified that she and Owens live together in a "committed relationship." However, Owens does not pay child support for his son Malachi and had paid at most $300.00 in support since his child's birth. VR at 10:26-10:27 and 10:34.

McCarty submitted the following list of "Kyra's Reasonable Needs (with monthly anticipated cost)" that, curiously, totaled exactly $5,000.00:

Kyra's Reasonable Needs (with monthly anticipated cost):

A comfortable and stable home, in a safe neighborhood, with her own bedroom and places to play:	$2,000
Standard utilities, access to reliable phones, internet connection	$350
Safe and reliable transportation	$800
Healthful, varied and nutritious meals:	$600

Routine medical, dental, and vision care:	$50
Clothes that fit and she looks and feels good in:	$200
Cultural, educational, and extracurricular opportunities	$250
Entertainment, gifts, simple luxuries:	$250
Educational Planning and Savings	$500
Total:	$5,000

McCarty's trial exhibit 3, Appendix tab 4 to her Brief.

McCarty had absolutely no evidentiary support for this list. Indeed, she testified that she did not then, nor had she ever, expended anything like these sums for Kyra, even though she had by the time of trial been receiving $2,000.00 per month from Faried since October of the preceding year and was still living, at no cost, with her parents. VR at 9:49:41.

Even though she had the funds available through that support and due to her cost-free residence to provide for Kyra as outlined on her list, McCarty conceded that her actual expenditures – for herself, Kyra, Owens and Malachi – were much lower than the "wish list" she submitted as "Kyra's reasonable needs." Her actual expenses were a car payment of $239.00 per month, insurance of $58.00 per month, cell phone of $150.00 per month, gas of $400.00 to $500.00 per month, $200.00 to $300.00 per month on food and groceries and $200.00 per month for miscellaneous expenses. She estimated her total expenses at $1,547.00 per month. VR at 9:22:17.

McCarty testified that even though she had been receiving $2,000.00 per month in child support since October 2012, and all of Kyra's childcare and

medical expenses had been paid by Faried, she had not moved from her parents' home into a home of her own. She hoped to rent a four bedroom house nearing completion that would rent for $900.00 per month. VR at 9:33:50 and 10:32. She believed that the utilities would cost $300.00 to $400.00 per month. VR at 9:42:44.

When these anticipated housing expenses were added to McCarty's actual expenditures, the cost of supporting her entire household of four was $2,847.00 per month.

McCarty testified that she did not need to buy clothes for Kyra because Faried frequently sends her large boxes of clothing for Kyra. VR at 9:44:13.

The cost of the expenses considered reasonable by McCarty were the cost for all five of the members of her household including not just Kyra but also herself, Owens, Malachi, and now her second child with Owens. VR at 10:27:38.

III. **Faried's evidence of Kyra's Needs.**

Faried presented proof at trial of McCarty's actual expenditures drawn from her bank account statements. For the 12 months from December, 2011 through November 2012, McCarty's actual monthly expenditures averaged $1,476.17. Appellant's Trial Exhibit 8.

Because McCarty was not living on her own and her housing expense was covered by her parents, Faried put on expert accounting evidence of what she would be paying for housing were she to establish an independent residence, that is, the median cost of housing in the county in which McCarty lived, as well as the adjacent county where she worked. Census reports and government data established that the median monthly cost of housing units in Bath County with a

mortgage was $842.00 and the median monthly cost of housing units without a mortgage was $281.00. The median monthly rental cost in Bath County was $500.00 to $749.00. Appellant's Trial Exhibit 6.

The median monthly cost of housing units with a mortgage in Rowan County was $946.00; the median monthly cost of housing units in Rowan County without a mortgage was $286.00 per month. The average monthly rental cost in Rowan County was $544.00. Appellant's Trial Exhibit 7.

When McCarty's actual expenses and anticipated housing expenses based on this data were combined, her total monthly living expenses averaged $2,318.16. Respondent's Trial Exhibit 9. These average expenses were for the entire family unit, not just Kyra. When divided by three to account for Kyra as one-third of the family unit (before trial Faried was not aware that McCarty's boyfriend was also living with her and she had not yet born her third child), the per capita cost for all household expenses was $772.72 per month. Appellant's Trial Exhibit 9. The per capital cost for McCarty's current family of five is $463.63 per month.

Faried pays directly for Kyra's personal individual expenses in addition to the child support payments. Faried provides Kyra's clothing, health insurance, pays all her out-of-pocket medical expenses, her childcare expenses, and pays all the travel expenses for himself and family members to visit with Kyra and for her to visit with Kenneth. VR at 11:18:15.

In addition to providing support for Kyra, Faried provides support for his impoverished parents and his brother who lives with him. Faried also pays his brother's college tuition. FOFCOL at 4; RA at 155.

McCarty expressed no interest whatsoever in moving away from Rowan County or Bath County, Kentucky. Therefore the cost of living in that area was the only cost relevant to Kyra's expenses.

IV. The Trial Court's Determination of Kyra's needs.

The trial court deplored the fact that the Court of Appeals in *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001), prohibited it from extrapolating from the guidelines and ordering Faried to pay over $11,000.00 per month in child support.[1] See FOFCOL at pages 11-15, RA at 162-166, and the child support calculation attached to the Findings of Fact and Conclusions of Law, RA at 169; App. at 27, which extrapolated from the guidelines.

Having rejected intellectually, but not emotionally, its inclination to extrapolate from the guidelines, the trial court then attributed to Kyra expenses commensurate with McCarty's wish list of a lifestyle for her entire immediate family, including not only Kyra but McCarty, McCarty's boyfriend Owens, and their son Malachi.

While Rebekah testified that she would like to rent a four bedroom home (for her four-member family) for $900.00 per month -- and the median rental cost where she lives is less than $600.00 per month -- the trial court found that housing would cost "Kyra" $1,200.00 per month. RA at 157.

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[1] The Court used $136,017.00 for Faried's monthly income, which was a 12 month average of Faried's total gross income (including endorsements) before deducting business expenses, including the NBA escrow of $132,000.00 per year which he testified was never restored, management fees, agent fees, employee salaries, dues, fines, cell phone and trainer fees, and before deducting income taxes of over $700,000.00 per annum. Faried's actual monthly income after these deductions is less than half of the income the trial court would have used in calculating the child support by extrapolating from the guidelines. RA at 154.

While McCarty testified that daycare costs $75.00 per week, the trial court attributed to Kyra daycare costs of $500.00 per month ($115.39 per week). RA at 157.

While McCarty testified that she paid $239.00 per month for her car payment and $58.00 per month for car insurance, the trial court attributed to "Kyra" a car payment of $500.00 per month, maintenance of $150.00 per month, and automobile insurance of $200.00 per month – a total of $850.00 per month and $553.00 per month more than McCarty actually spends. RA at 157.

While McCarty testified that she spends $200.00 to $300.00 per month for food for the entire family, the trial court attributed to "Kyra" $400.00 for the cost of "nutritious food." RA at 157.

The trial court attributed to "Kyra's" expenses $100.00 per month for clothing, even though McCarty testified that Kyra is fully clothed by Faried. The trial court attributed to "Kyra's reasonable needs $400.00 per month for activities" (including "gymnastics and educational"), even though McCarty testified that she did not engage in any such activities. RA at 157.

Finally, the trial court included in Kyra's expenses $50.00 for "over the counter medical expenses," even though it assigned to Faried responsibility for all of Kyra's medical expenses. RA at 157 and 167.

While McCarty's proof of her four-member family's needs when she moves out of her parents' home and into a home of her own would total at most $2,847.00 in monthly expenses, the trial court found that "Kyra's" reasonable needs were $4,250.00 per month and ordered Faried to pay that sum as child support to Rebekah. RA at 153 and 157.

This sum of $4,250.00 per month tracks closely to McCarty's testimony of what "she believes Kyra's reasonable monthly needs are," rather than her actual expenditures or realistic housing expenses as estimated either by McCarty or based on reliable statistical data. Compare the trial court's "reasonable needs" (FOFCOL at 6, RA at 157) and McCarty's wish list of reasonable monthly needs. (FOFCOL at 3, RA at 154).

V. The Court of Appeals Opinion Reversing and Remanding.

The Court of Appeals vacated the child support order, finding that the trial court abused its discretion in setting child support at $4,250.00 per month based on its assessment of Kyra's reasonable needs at a "figure seemingly born of whole cloth because it does not comport with McCarty's testimony, and some of the items identified by the court were not requested by McCarty. It appears the trial court has attempted to micromanage the rearing of Kyra by using its *own* estimate of costs and needs—supplanting the way McCarty and Faried would raise their daughter with the way the trial court would raise Kyra." Opinion at p. 23.

As the Court of Appeals noted, McCarty's testimony and evidence were that her monthly expenses "amounted to $1,547.00. She then testified to a variety of *potential* expenses . . . she has never incurred and may never incur. . . ." Opinion at p. 20 (emphasis in original). "Adding potential, but as yet unincurred, monthly housing costs of $1,300.00 for rent and utilities, McCarty's total expenses for the entire four-person household would be just $2,847.00 per month, making the trial court's monthly award of $4,250.00 a curiosity." Opinion at p. 2.

The Court of Appeals rejected this tail wagging the dog approach to determining the reasonable needs of a child from the bench's perspective of an appropriate lifestyle rather than the lifestyle actually chosen by the parents. It concluded that the "child support order must be rooted in reality and bear a reasonable relationship to the evidence—hopes, dreams and plans simply are not evidence of actual expenses and reasonable needs." Opinion at p. 22.

The Court of Appeals rejected McCarty's argument that where parents have never lived together, child support should be based on the obligor parent's ability to pay rather than the child's reasonable needs. The Court was concerned that such an approach would remove all factually ascertainable grounds for the child support determination, replacing them with a "case . . . built on rank speculation" and an order that "was not based in fact, was speculative, and was wholly unrelated to the child's 'reasonable needs.'" Opinion at pp. 3 and 5.

The Court of Appeals rejected the trial court's adoption and improvement upon McCarty's guesstimation of "a variety of *potential* expenses . . . she has never incurred and may never incur, such as renting a four-bedroom home; utilities for that home; food; clothes for Kyra; private school for Kyra—even though there is no private school in Bath county—gymnastics training for Kyra; and trips for Kyra." Opinion at p. 20.

Citing the barely distinguishable case of *Bell v. Cartwright*, 277 S.W.3d 631 (Ky. App. 2009), the Court of Appeals rejected the trial court's approach as grounded in "speculation, . . . [T]o base the initial award on events that may never come to fruition is a course we are unwilling to chart." Opinion at p. 21.

Relying upon potential but as yet unincurred expenses, McCarty arrived at "total expenses for the entire four-person household of just $2,847.00 per month," which, the Court of Appeals noted, "ma[de] the trial court's monthly award of $4,250.00 a curiosity." Opinion at page 2.

The Court noted that McCarty could seek modification of the child support order as Kyra's reasonable needs change in the future. Opinion at 22.

The Court of Appeals further addressed Faried's complaint that the child support order placed the burden on him, and him alone, to support the entirety of McCarty's family, including not just his daughter but also McCarty, McCarty's boyfriend, McCarty's child with her boyfriend and now her second child with her boyfriend. "One must keep in mind the trial court's task in this case is to establish a proper amount of *child support* not *family support*. Thus, it is critical that only a reasonable share of the costs for housing, food, utilities, and other household expenses be apportioned to Kyra and ultimately included in Faried's child support obligation." Opinion at page 23 (emphasis in original).

Finally, the Court of Appeals reversed the trial court's order that the increase in child support be retroactive to the establishment of temporary support, creating an arrearage of $24,100.00. McCarty's actual expenditures between the time that order was entered for $2,000.00 per month had not changed and she had not incurred and paid any expenses over and above the $2,000.00 originally ordered. Therefore, the Court of Appeals advised the trial court on remand that "it would be inappropriate to make retroactive an as yet unincurred expense." Opinion at page 24.

ARGUMENT

I. The Court of Appeals correctly reversed the trial court for basing its child support decision on speculation rather than evidence produced at trial.

The issue before this Court is what evidence a trial court may rely upon in setting child support when it is appropriate to deviate from the child support guidelines because of the parents' incomes, but the parents never created a family lifestyle by which to gauge their child's "reasonable needs."

The issue is created because the courts are authorized to deviate from the guidelines where their application "would be unjust or inappropriate," as for example where the "[c]ombined monthly adjusted parental gross income [exceeds] . . . the guidelines." KRS 403.211(3)(e). Where deviation is appropriate, child support is to be "set in an amount which is reasonably and rationally related to the realistic needs of the children." *Downing v. Downing*, 45 S.W.3d 449, 456 (Ky. App. 2001). "[A]ny decision to set child support above the guidelines must be based primarily on the child's needs, as set out in specific supporting findings." *Id.*

The trial court may not "determine the reasonable needs of the children by mathematically calculating child support over and above the maximum guidelines without entering specific findings as to the needs of the children and their standard of living." *Downing, supra*, 45 S.W.3d at 455.

McCarty argued in the trial court, and the trial court agreed, that the child's actual needs, as established by evidence of the parents' actual expenditures, should be ignored where the father could afford to provide a more affluent lifestyle than the child actually enjoys. Because the trial court declined to rely on

traditional proof of the child's existing lifestyle, it created a superior lifestyle for the child and order Faried to pay sufficient child support to provide that lifestyle.

Take as an example of the trial court's impressing upon this family its own lifestyle choices its inclusion in the child support order of $850.00 per month for "Kyra's" transportation needs. Although McCarty testified that she had a purchased an automobile of her choice on which she was making a payment of $239.00 per month and paying an insurance premium of $58.00 per month, the trial court included in the child support a car payment of $500.00 per month, maintenance of $150.00 per month, and insurance of $200.00 per month. The support order thereby increased "Kyra's" transportation expense from the $297.00 per month expense McCarty had actually incurred to $850.00 per month—a 65% increase over the actual transportation expense for McCarty's family.

Was there evidence to support this finding? Absolutely none. McCarty never testified that she found the vehicle she had purchased to be insufficient or unreliable. She never complained about the vehicle at all. She presented no evidence nor made any argument that were the child support to be increased she would purchase another vehicle that would cost more money, much less that she would incur a $500.00 per month car payment and a $200.00 per month insurance premium, or that her new car would require $150.00 per month to maintain.

Every element of the trial court's child support order of $4,250.00 per month suffered from the same weakness. The daycare cost built into the child support order was $40.00 more per week than Faried was paying for the

childcare provider McCarty chose. The groceries built into the child support order cost twice the amount McCarty actually spent for her entire family (apparently, that is the difference between the food McCarty chose to purchase for her family and "nutritious food"). The trial court included in the support order $400.00 per month for "activities" McCarty had never obtained for Kyra and which were, in many cases, unavailable in the area in which McCarty chose to live.

In reversing the trial court's decision, the Court of Appeals reaffirmed its holdings in *Downing*, *supra*, and the plethora of cases setting the reasonable needs of the child, established through evidence of the child's lifestyle, as **the** basis for a child support order that would then "be rooted in reality and bear a reasonable relationship to the evidence." Opinion at p. 22. It warned against a trial court setting child support so as to "micromanage the rearing of [the parties' child] by using its *own* estimate of costs and needs—supplanting the way [the parents] would raise their [child] with the way the trial would raise" her. Opinion at p. 23.

McCarty is asking this Court to overturn decades of precedent by deleting the child's reasonable needs as the standard for determining child support where the court chooses to deviate from the guidelines. She argues that in cases where the parents have not established a joint lifestyle this standard can result in an unfairly low amount of support where the obligor can afford to pay for a more affluent lifestyle than the obligee parent can establish and therefore prove as evidence of the child's reasonable needs.

The trial court bought this argument and the result was anarchy. Instead of establishing child support reasonably related to Kyra's actual needs, the trial

court assessed her needs at a "figure seemingly born of whole cloth" not reasonably related to any evidence. Opinion at p. 23.

In *Downing* and its progeny, the Court of Appeals established an evidence-based analysis for establishing child support off the guidelines. Here, the trial court abandoned any evidence-based process and embarked on an analysis based wholly and entirely on its own impression of a lifestyle it would create not just for this child, but for McCarty's entire family. The trial court offered no facts for the costs it attributed to Kyra's expenses. Certainly, neither McCarty's testimony nor her "exhibit" of "Kyra's reasonable needs" had any basis in reality. It was a "guesstimate" of what she would spend if she had the money to do so. "[H]er case was built on rank speculation with no documentation of Kyra's actual expenses for the court to consider." Opinion at p. 3.

Against all legal precedent, the trial court substituted its own determination of what it would cost to raise Kyra in the manner the trial court felt was best for any actual evidence of either the lifestyle the parties had in fact chosen and the cost of that lifestyle. "Courts decide cases based on evidence produced at trial, not extrajudicially-obtained information that is not common knowledge." *Matheny v. Commonwealth*, 191 S.W.3d 599, 633 fn.1 (Ky. 2006). "[A] judge is not authorized to make his individual knowledge of a fact not generally known the basis of his action." *Colley v. Colley*, 460 S.W.2d 821, 824 (Ky. 1970). "While it may be that the trial judge had information from an undisclosed source . . . , such information does not constitute evidence, nor would the judge be authorized to act upon such information as constituting a fact within his judicial knowledge . . .

To hold otherwise would destroy the very purpose for which our courts are established." *Gray v. Commonwealth*, 264 S.W.2d 69, 70-71 (Ky. 1954).

Contrary to McCarty's argument, turning the court's back on an evidence-based analysis of Kyra's needs was not only unwise, it was also entirely unnecessary. With the sole exception of a residence, there was no indication that McCarty would choose any lifestyle for Kyra other than what she had actually established. Between October, when the $2,000 per month child support (plus health insurance and childcare) was established, and the trial the following June, McCarty did not take advantage of the support being provided to change Kyra's lifestyle in the least. She did not move from her parents' home. She did not begin purchasing better food for Kyra, obtain a different, more reliable car, change childcare provider, or buy clothes in addition to those Faried was sending. The only change McCarty made was to move Owens in with her and have another child (now two more children).

Faried acknowledged at trial that McCarty was living in her childhood home with her parents and therefore had not provided proof of the cost of independent living for Kyra. But the fact that he and McCarty had not established a joint residence separate from McCarty's parents did not deprive the trial court of actual evidence of the true cost of establishing a reasonable separate residence. McCarty testified that she hoped to rent a home that was being built at a rental cost of $900 per month. Faried put in proof of the median cost of renting or buying a home in the area that McCarty lived. The trial court ignored both of these reliable indicators of the cost of housing and used $1,200 per

month—significantly more than either McCarty or Faried established—as the cost to Faried of housing for "Kyra."

Even where the parents have not established a joint lifestyle, establishing by evidence the documented, existing, reasonable needs of the child remains an effective and rational method for determining child support. Not only is there no need for the trial court or the parties to guess at a reasonable lifestyle, but it is inherently dangerous to the rule of law to do so. This case provides a perfect example of the anarchy that results when the trial court resorts to its own life experiences as a substitute for evidence of the parents' actual, established living standards. Absurdities such as ordering the father to pay for the mother to obtain nutrition and financial counseling, private education where the child is in daycare, there are no private schools, and no indication the available public schools are inadequate, and allowances for activities the child does not participate in are the result.

II. The Court of Appeals' direction on remand that an increase in child support should not be retroactive and therefore compensate for as yet unincurred expenses should not be disturbed.

The trial court made the new order increasing Faried's child support obligation from $2,000.00 to $4,250.00 per month retroactive to October 1, 2012, creating an arrearage of $24,100.00. RA at 167. Faried argued that making the order retroactive was an abuse of discretion in that McCarty had not incurred additional expenses for Kyra after the original support order was set, and therefore had incurred no expenses for which she would be reimbursed by an arrearage judgment.

McCarty argues here, as she did below, that the issue was not preserved for appeal. The Court of Appeals acknowledged the argument but held that the trial court "has discretion over the effective date of any increase . . ., but it would be inappropriate to make retroactive an as yet unincurred expense." Opinion at p. 24. The issue was, in fact, preserved through argument at the close of the hearing and Faried's CR 59 motion to alter, amend or vacate the trial court's order. VR at 1:44:14 and RA at 170-174.

McCarty now argues that the trial court did **not** have discretion and was required by law to make the modification of child support retroactive. This argument was not, in fact, made in the trial court and was not preserved for appeal.

The argument is, moreover, wrong. This Court has unambiguously held that the effective date of modification of a child support order is within the sound discretion of the court. *Ullman v. Ullman*, 302 S.W.2d 849, 850-51 (Ky. 1982); *Giacalone v. Giacalone*, 876 S.W.2d 616, 620 (Ky. 1994).

Despite this clear precedence, McCarty argues that KRS 403.160 removed the trial court's discretion and required that the new order increasing the child support by $2,250.00 per month be made retroactive. McCarty misreads the statute, which provides for retroactivity of short term, temporary orders of child support established under the child support guidelines—not of orders for off-guidelines child support over the span of many months, as in this case.

KRS 403.160 provides a procedural mechanism for a quick guideline child support calculation based solely on the affidavits of the parties attesting to their incomes. Under KRS 403.160(2)(a), the trial court "shall, within fourteen (14)

days from the filing of said motion, order an amount of temporary child support based upon the child support guidelines as provided by law, and the ordered child support shall be retroactive to the date of the filing of the motion *unless otherwise ordered by the court*." (Emphasis supplied.) Thus, the order for child support under this statute (1) is limited to guideline child support; (2) is retroactive over only a 14 day period; and (3) retroactivity is discretionary as the court may order "otherwise."

KRS 403.160(2)(b) similarly allows the trial court to quickly order guideline child support based on affidavits. Under this provision, the obligor has the ability to file an adverse affidavit and an order based on that affidavit is to be entered pending a hearing. The obligor is to pay guideline child support pending the hearing and the "child support order entered following the hearing shall be retroactive to the date of the filing of the motion for temporary support *unless otherwise ordered by the court*." (Emphasis supplied.)

Child support was never entered in this case under the authority of KRS 403.160, which applies only to guideline child support. McCarty always sought a deviation from the guidelines. The $2,000.00 per month temporary order entered in October 2012 in fact deviated from the guidelines as the guidelines do not permit an order exceeding $1,225.00 per month for one child. And the language of the statute expressly allows the court to not make modification retroactive.

Therefore, the Court of Appeals correctly applied this Court's decisions that the effective date of modification of a child support order is within the sound discretion of the court.

The Court of Appeals further correctly advised the trial court on remand that "it would be inappropriate to make retroactive an as yet unincurred expense." As established at trial, McCarty's monthly household expenses amounted to $1,547.00. Any expenses exceeding that amount were guesstimations imputed by the trial court, but never actually incurred by McCarty.

By making the child support order retroactive, the trial court provided a windfall to McCarty to reimburse her for expenses she never expended. In essence, the retroactivity of the order was nothing more than a transfer of wealth from Faried to McCarty as she did not incur the expenses attributed to that $4,250.00 per month order other than $1,750.00 per month she actually expended during that year. During that year, Faried was paying $2,000.00 per month in child support plus Kyra's daycare and medical expenses, so McCarty received more in child support than she was expending either for Kyra or her entire family.

McCarty argues that the retroactivity of the permanent support order was justified by the lapse between the temporary support order and entry of the permanent support, which she wrongly assigns to Faried, blaming his work schedule and purported refusal to answer discovery. The record shows her statements are untrue. The case was set to be tried in January 2013 and was remanded by the trial court by a *sua sponte* order that the parties participate in mediation before trial. RA at 89-90. The trial was then re-set immediately after the parties mediated. Nor did Faried refuse to provide relevant financial information. He properly objected to the broad scope of the financial information sought. RA at 98-109. The trial court agreed with his objection and ordered

him to submit *in camera* a small piece of the information requested, which he promptly did.

The trial court is authorized to make a change in child support retroactive to the motion for establishment of modification under the rationale that the parent is out of pocket for those expenditures in the interim. In this case, McCarty was not out of pocket for the enhanced lifestyle the trial court believed she should enjoy as she had not in fact embraced that lifestyle before the higher award was made. By making the amount retroactive, the trial court reimbursed McCarty for expenses she never "bursed." The Court of Appeals correctly directed the trial court on remand to forebear from making retroactive any "as yet incurred expense."

III. The Court of Appeals' direction that on remand the corrected child support require Appellee to support only his own child and not also the Appellant, her boyfriend, and their children was correct and should not be disturbed.

In addition to finding that the trial court had abused its discretion in "arbitrarily increasing Faried's child support obligation to an amount more reflective of his ability to pay rather than his daughter's reasonable needs as established at trial," the Court of Appeals also addressed Faried's complaint that the child support order placed the burden on him, and him alone, to support the entirety of McCarty's family, including not just his daughter, but also McCarty, McCarty's boyfriend Kahlil Owens, and McCarty's child with Owens: "One must keep in mind the trial court's task in this case is to establish a proper amount of *child support* not *family support*. Thus, it is critical that only a reasonable share of the costs for housing, food, utilities and other household expenses be

apportioned to Kyra and ultimately included in Faried's child support obligation." Opinion at p. 23 (emphasis in original).

McCarty attacks this observation, characterizing the order of support as providing only "[i]ncidental benefit to others," which she argues is "irrelevant to a true analysis of child support deviation focused solely on the individual child." Appellant's brief at 12.

The Court of Appeals disagreed that an order that clearly requires a parent to support not only his own child, but the child's mother, boyfriend and children with that boyfriend is an "incidental benefit" the state has the authority to impose on that parent. The Court's concern arose out of the mathematical certainty that the expenses on which the trial court based its award of child support were the expenses of McCarty's four-person family, including, for example, the full cost of rent and utilities of a four-bedroom home (clearly unnecessary for McCarty and Kyra alone). Indeed, the Court of Appeals noted that the child support order exceeded "McCarty's total expenses for the entire four-person household." Opinion at p. 2. It also noted that Owens – with whom McCarty has now borne a second child, making theirs a household of five – had at the time of trial provided only $300.00 total in child support – making the fact of Faried being the only provider for this family an absolute certainty. Opinion at p. 6, fn. 4.

McCarty then argues that it was within the trial court's discretion to order Faried to support McCarty and the other members of her family because "[h]ad the parents married and divorced, and the primary custodian remarried, that remarriage would not affect the award of child support. The obligated parent is

not excused from his or her support obligation as a result of a new relationship for either parent." Appellant's Brief at 12-13.

McCarty's argument is illogical. It correctly assumes that an award of initial child support for a divorced couple's children would not change because of the obligee's remarriage. Faried accepts that hypothesis as supporting his position. Upon the obligee's remarriage, the obligor's support obligation for his or her child would not be increased to accommodate the larger family, including, for example, a larger home with its greater costs. Just so, Faried's child support should not include the costs of a four-bedroom home to accommodate McCarty, her boyfriend and their now two children.

As the Court of Appeals ruled, "we are unaware of any requirement that [Kyra's] father be the sole provider just because he has the means to do so. Kyra is fortunate to have two parents and both should contribute to her upbringing." Opinion at p. 23. Similarly, McCarty's and Owens' now two children have two parents and they should contribute to their upbringing. Without doubt, McCarty and Owens should be responsible for their own support. An order placing the burden on Faried of supporting McCarty, Owens and their children was an abuse of discretion.

The trial court not only made no effort to apportion Kyra's share of the general household expenses that made up the "reasonable needs" of McCarty's family but derided Faried's CR 54 request that it do so, stating that it was within the State's authority to set child support for one child in an amount sufficient "to support the entire maternal side of the family." CR 59 order at 3; RA at 196-97. And that was, in fact, precisely what the trial court did. The cost of general family

expenses such as housing and transportation make up the bulk of the trial court's recitation of "Kyra's reasonable needs" on which the child support order was based. These costs were the total cost for the family as testified to by McCarty in her expense "wish list."

Thus, the trial court conceded that the expenses found for Kyra are in fact the expenses for Kyra, McCarty, Owens and Malachi. The Court of Appeals agreed that Faried should not be required to bear the cost of the entire family's expenses through his child support for his child. As McCarty and Faried were never married, Faried bears no legal financial obligation for McCarty's support. Clearly, he has no legal obligation to support McCarty's child Malachi or her boyfriend Owens. By basing the child support on the expenses of this entire, four-member (now five-member) family, rather than the actual expenses of his own child, the trial court erroneously disguised a maintenance order as child support.

While this is an issue of first impression in this Commonwealth, it has been addressed head-on by Connecticut appellate courts. In *Brown v. Brown*, 190 Conn. 345, 349, 568 A.2d 1287 (1983) (Appendix at 1-4) the mother's affidavit "stated that her weekly expenses for her household totaled $340.23. "At the time of trial the 'household' included the plaintiff, her minor son and her daughter, who was over 18 years of age." *Brown, supra*, 460 A.2d at 1289, App. at 3. The trial court ordered the defendant to pay child support of $325.00 per week. "Clearly," the Connecticut Supreme Court noted, the "cost of the household attributable to the support of the plaintiff and her adult daughter exceeded the $15.23 per week difference between the court's support award and

the plaintiff's household financial needs." *Id.* "It was obvious that the child support award was grossly disproportionate to the child's needs . . . Child support orders must be based on the statutory criteria . . . of which one of the most important is the needs of the child. The support award may not be used to disguise alimony awards to the custodial parent." *Id.*

This principle has been repeatedly applied by Connecticut appellate courts. In *Maturo v. Maturo*, 296 Conn. 80, 995 A.2d 1, 15 (2010) (App. at 5-41), the court recognized that "the effect of unrestrained child support awards in high income cases is a potential windfall that transfers wealth from one spouse to another or from one spouse to the children under the guise of child support." "When a parent has an ability to pay a large amount of support, the determination of a child's needs can be generous, but all any parent should be required to pay, regardless of his or her ability, is a fair share of the amount *actually necessary* to maintain the child in a reasonable standard of living. Court-ordered support that is more than reasonably needed for the child becomes, in fact, [tax free] alimony.'" *Id.* at 15-16, App. at 14-15, *quoting Kalter v. Kalter*, 155 Mich. App. 99, 104, 399 N.W.2d 455 (1986).

These principles have been applied by a Connecticut appellate court to circumstances like those here where the parents were never married, but the father has substantially greater financial assets than the mother. In *Rodriques v. Butler, No. FA*930103245S (Sup.Ct.Conn. 2010) (unpublished opinion attached hereto in App. at 42-47), the Connecticut Superior Court noted that "there is no doubt that the respondent is far better off materially than the custodial mother. But the court is not directed or authorized to divide the parties' property or

equalize or rebalance their incomes. These parties were never married. The court is cautioned in our case law against allowing a child support award to become alimony in disguise." *Id.* at *6; App. at 45.

In *Downing, supra*, the Court of Appeals similarly observed that "[a]n increase in child support above the child's reasonable needs primarily accrues to the benefit of the custodial parent rather than the children. In addition, this approach effectively transfers most of the discretionary spending on children to the custodial parent. Furthermore, a strict reliance on linear extrapolation could result in vast increases in child support unwarranted by the children's actual needs. Beyond a certain point, additional child support serves no purpose but to provide extravagance and an unwarranted transfer of wealth." *Downing, supra* at 455-56.

The trial court's award of child support in this case was one and a half times McCarty's entire household's personal expenses, credible anticipated housing expenses, and actual expenditures on behalf of Kyra. The trial court conceded that the other members of the family "might receive a benefit" from the ordered amount of child support. RA at 197. In fact, since Owens pays no support for his child and the court did not attribute any of McCarty's income to payment of the household's expenses, the other members of Kyra's family will be fully supported by Kyra's child support. The trial court clearly determined that the cost of supporting Kyra includes the cost of also supporting McCarty, Malachi and Owens. This is simply a case of maintenance and support for unrelated persons disguised as child support for Faried's one child.

McCarty asserts that this issue was not preserved for appeal. This statement is untrue. Faried's expert accounting witness computed the total average cost to McCarty of all her monthly living expenses (including the estimated cost of a house with mortgage in Bath County based on the U.S. Census Bureau's American Community Survey) and divided the total living expenses by three to reach the living expenses for the child alone.[2] Ms. DeArk testified that the entire household's monthly living expenses were $2,318.16 and, therefore, Kyra's 1/3 share of those expenses was $772.72. See Faried's trial exhibit 9.

Additionally, Faried raised this argument in his CR 59 motion and the trial court directly addressed it in its order granting in part and denying in part that motion. See CR 59 order at pp. 2-3, RA at 196-197. The issue was clearly preserved for appeal.

The Court of Appeals correctly determined that the State may not require a parent to support the other parent and that parent's family under the guise of child support. The family court must determine the portion of the family's expenses attributable solely to the child and set child support in that amount only.

CONCLUSION

The Opinion of the Court of Appeals should be affirmed, the child support order vacated, and the case remanded to set child support so as to provide support only for Appellee's child based on the child's reasonable expenses as established by the evidence and effective as of entry of the new order.

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[2]Because Faried was not aware prior to the hearing that Owens was living with McCarty, he used three for the total number of members of her household. Evidence at the hearing established that the actual total count for McCarty's household was four, so Faried argued that the total household expenses should be divided by four instead of three.

Respectfully submitted,

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APPENDIX